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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. AB 1043 (Sub-No. 1)

**MONTREAL, MAINE & ATLANTIC RY., LTD.
-DISCONTINUANCE OF SERVICE AND ABANDONMENT-
IN AROOSTOOK AND PENOBSOT COUNTIES, MAINE**

**REPLY COMMENTS OF
CANADIAN PACIFIC RAILWAY COMPANY**

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Dated: August 10, 2010

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Pursuant to the Decision issued in the above-captioned proceeding on July 20, 2010 (the "*July 20 Decision*"), Canadian Pacific Railway Company ("CP") respectfully submits these Reply Comments addressing two jurisdictional questions posed by the Board: (1) "whether the provisions of 49 U.S.C. § 10903 and 49 U.S.C. § 10904 would support the imposition of conditions in this case requiring access of any sort (including trackage rights and haulage rights)" in connection with an Offer of Financial Assistance ("OFA") filed by the State of Maine (the "State"), and (2) "[the Board's] authority to order access over a carrier's lines into a foreign country." *July 20 Decision* at 3.¹

As CP's August 3 Comments demonstrated, the plain language of 49 U.S.C. § 10501(a)(2) and numerous court and agency decisions interpreting that statutory provision make clear that the Board has no jurisdiction to grant trackage rights or any type of access over rail lines located in Canada. The statutory language of 49 U.S.C. §§ 10903 and 10904 and

¹ As stated in CP's Comments filed on August 3, 2010 (at 1, n.1), CP takes no position with respect to the merits of the abandonment application filed by Montreal, Maine & Atlantic Railway, Ltd. ("MM&A") or the OFA submitted by the State in this proceeding. Nor does CP take any position as to whether (assuming *arguendo* the Board did have jurisdiction to impose ancillary access rights in connection with an OFA) the facts and circumstances would warrant such relief in this proceeding.

judicial and STB/ICC precedents likewise establish that the Board does not have authority to impose conditions granting trackage rights or access over ancillary lines in connection with an OFA filed in response to a Section 10903 abandonment application. Neither the State nor the shipper parties that filed comments in response to the *July 20 Decision* cite any authority that would support a contrary conclusion.

I. THE COMMENTS FILED BY THE STATE OF MAINE AND SHIPPER PARTIES FAIL TO ARTICULATE ANY LAWFUL BASIS FOR THE BOARD TO ASSERT JURISDICTION OVER RAIL LINES IN CANADA OR MEXICO.

CP's Comments demonstrated that, whatever authority the Board might otherwise have to impose trackage rights or other access conditions in connection with abandonment and OFA proceedings, it has no jurisdiction to grant such rights over railroad lines located in Canada or Mexico. The statute setting forth Congress' general grant of jurisdiction to the Board (49 U.S.C. § 10501(a)(2)) could not be clearer: the agency's jurisdiction over cross-border rail transportation "applies only to transportation in the United States between a place in . . . the United States and a place in a foreign country." (Emphasis added). The courts and the STB/ICC have held on numerous occasions involving nearly every aspect of the Board's regulatory authority that the agency does not have the power to regulate rail carriers, railroad lines or rail transportation performed in a foreign country. *See* CP Comments at 2-7 (and cases cited therein). Indeed, the Board has expressly disclaimed jurisdiction to authorize trackage rights over the very same Canadian track to which the State seeks access in this proceeding. *See Canadian National Ry. Co. - Trackage Rights Exemption - Bangor and Aroostook R. Co.*, STB Finance Docket No. 34014 (Served June 25, 2002) ("*CN-BAR Trackage Rights*") at 2, n.4 (CN

acquisition of trackage rights over Van Buren Bridge Company track between US- Canada border and St. Leonard, NB “was not subject to the Board’s jurisdiction”).²

No party takes issue with this longstanding interpretation of the geographic scope of the Board’s Section 10501 jurisdiction. Instead, the State and certain shipper parties seek to persuade the Board that the access condition requested by the State does not implicate the territorial limits of its statutory jurisdiction. While acknowledging that “the Board would not have jurisdiction over any necessary rights in Canada,” the State contends that “there is no reason that [the Board] cannot require MMA to take an extra-territorial action as a condition to the grant of abandonment authority.” (State Comments at 9.) Similarly, Louisiana Pacific asserts that “there can be no serious doubt” that the Board can impose the trackage rights condition requested by the State because “the Board would not be affirmatively ordering MMA to grant such trackage rights, but rather would be telling MMA that it will have to grant such rights *voluntarily* if it wants to proceed with its proposed abandonment.” (Comments of Louisiana Pacific Corp. at 6, n.3 (emphasis in original).)

The distinction that these parties attempt to draw is one without any meaningful difference. A condition requiring MM&A – “voluntarily” or otherwise – to grant the State or its designated operator trackage rights over that portion of MM&A’s Madawaska–St. Leonard line that lies north of the US–Canada border would clearly be an order involving railroad lines and future transportation service that is not within the United States. Section 10501(a)(2) does not

²² The Board likewise held that it did not have jurisdiction over that same Canadian track when MM&A acquired the lines at issue in this case. *Montreal, Me. & Atl. Ry. LLC—Acquisition and Operation Exemption—Bangor & Aroostook RR Co., Canadian American RR Co., N. Vt. RR Co., Newport & Richford RR Co., & Van Buren Bridge Co.*, STB Fin. Docket No. 34110 (served Sept. 19, 2002) (“*MM&A-BAR*”), slip op. at 3 n.2 (certain lines and assets acquired by MM&A, including portion of Van Buren Bridge north of the International Boundary Line, “are located in Canada and are not subject to Board jurisdiction”) (emphasis added).

empower the Board to impose, or to authorize, such rights. Indeed, the trackage rights over the very same line segment that the Board disavowed jurisdiction to approve in *CN-BAR Trackage Rights* were voluntarily agreed to by CN and the Van Buren Bridge Company. The Board cannot lawfully circumvent territorial limitations on its jurisdiction by requiring parties to agree “voluntarily” to conditions that the Board itself has no authority to impose.

Arguments proffered by other commenting shippers in support of the State's extra-territorial trackage rights condition are equally unpersuasive:

Irving contends that a grant of trackage rights across the Van Buren Bridge into Canada “is warranted due to the large volume of cross border traffic.” (Irving Comments at 7, n.3.) Irving is wrong – the Board may not lawfully exceed its statutory jurisdiction, regardless of the alleged benefits that might result from doing so.

Huber Engineered Woods (“Huber”) suggests that the State’s proposal “should present no extra-territorial limitations on the Board’s authority under section 10903” because granting the State (or its designee) the right to operate all the way to St. Leonard would simply “place a new carrier in the same position as MMA is today.” (Huber Comments at 7, n.1.) But the mere fact that MM&A possesses the right to operate both in the United States and in Canada does not confer upon the Board jurisdiction to authorize a successor to MM&A to conduct rail operations in a foreign country. To the contrary, in the exemption notice published in connection with MM&A’s acquisition of its lines in Maine in 2002, the Board expressly held that it did not have jurisdiction to authorize MM&A to acquire its Canadian tracks – including the segment over which the State now seeks to operate. See *MM&A-BAR*, slip op. at 3 n.2.

Finally, Twin Rivers Paper Company and Fraser Timber Limited (“Twin Rivers/FTL”) support the State’s request for trackage rights between the US-Canada border and St. Leonard,

NB on the grounds that “[t]here is no apparent distinction between the Board’s authority to order access *within* the U.S. borders and its authority to order access *to* the U.S. borders.” (Twin Rivers/FTL Comments at 4 (emphasis in original).) To the extent that this vague assertion is intended to suggest that the Board may grant trackage rights “within” the United States from Madawaska “to” the U.S. border point in the middle of the Van Buren Bridge – but not beyond the US-Canada boundary to St. Leonard, NB – CP agrees that a hypothetical grant of such rights would be within the scope of the Board’s geographic jurisdiction pursuant to Section 10501(a)(2).³ However, if Twin Rivers/FTL are suggesting that a grant of trackage rights “to” the US – Canada border may include “lines into a foreign country” (Twin Rivers/FTL at 4) – i.e., rights from the US-Canada boundary on the Van Buren Bridge to a point of connection with CN at St. Leonard–Twin Rivers/FTL is mistaken. The physical boundary between the United States and Canada marks the outer limit of the Board’s regulatory authority over cross-border transportation.

In summary, Section 10501(a)(2) expressly limits the territorial scope of the Board’s powers “only to transportation in the United States.” 49 U.S.C. § 10501(a)(2) (emphasis added). Neither Section 10903 nor Section 10904 – or for that matter, any other statutory provision or court or agency precedent – remotely suggests any intention on the part of Congress to authorize the Board to exercise its regulatory powers extraterritorially. Accordingly, CP respectfully submits that the Board does not have jurisdiction to grant the State’s request for trackage rights or haulage rights from the US-Canada border in the middle of the Van Buren Bridge to a point of connection with the lines of CN in the vicinity of St. Leonard, NB.

³ However, as CP demonstrates in Part II below, and in the CP Comments, neither 49 U.S.C. § 10903 nor 49 U.S.C. § 10904 authorizes the Board to impose the trackage rights condition requested by the State in this case, even with respect to rail lines located within the United States.

II. THE RELIANCE OF THE STATE AND COMMENTING SHIPPERS ON SECTION 10903 AS A SOURCE OF AUTHORITY TO GRANT ANCILLARY TRACKAGE RIGHTS OR ACCESS IN CONNECTION WITH AN ABANDONMENT OR OFFER OF FINANCIAL ASSISTANCE IS MISPLACED.

Both the State and commenting shippers acknowledge that 49 U.S.C. § 10904 does not authorize the Board to grant an OFA purchaser ancillary trackage rights (or other forms of access) over rail lines that are not part of the proposed abandonment or OFA.⁴ However, they contend that the Board can accomplish the same result pursuant to 49 U.S.C. § 10903(c), by imposing a condition on its approval of the proposed abandonment that would require MM&A to grant such rights to the State.

For example, Louisiana Pacific asserts that the Board's conditioning authority under Section 10903 is "expansive" (Louisiana Pacific Comments at 2, 4), and that that provision gives the Board "broad discretion and authority to impose any conditions on abandonments that are necessary to ameliorate potential adverse effects" (*id.* at 3). In a similar vein, Huber claims that Section 10903 confers on the Board "unfettered authority" to impose conditions on abandonments. (Huber Comments at 1.) Irving declares that Congress has given the Board "wide latitude" to impose conditions in abandonment proceedings and "has put 'no restriction' on the conditions that can be attached to an abandonment decision." (Irving Comments at 3.) Twin Rivers/FTL goes so far as to state that the Board not only has the "power" to impose trackage rights conditions on an abandonment under Section 10903, "but, in fact, has a duty to do so when shipper and community interests, rural and community development considerations,

⁴ While acknowledging STB/ICC precedent establishing that the Board may not impose trackage rights in setting terms and conditions for an OFA under Section 10904, the State "urges the Board to reconsider the previous policy as set forth in these cases." (State Comments at 8.) However, the cases cited by MM&A, CP, and other parties (and acknowledged by the State) do not articulate discretionary "policies" that the Board is free to alter or disregard. Rather, those rulings (correctly) decide issues regarding the Board's statutory jurisdiction that the agency is not at liberty to ignore.

and national transportation policy goal implementation require such rights.” (Twin Rivers/FTL Comments at 3-4.) The State contends that, under Section 10903, the Board has the power “to condition the grant of abandonment authority on the applicant agreeing to provide trackage rights to an operator of the lines.” (State Comments at 8.)

These assertions ignore a very significant limitation on the Board’s Section 10903 conditioning authority that is set forth in the statute itself. Section 10903(e) – which is the specific source of the Board’s conditioning authority in abandonment cases (*see July 20 Decision* at 3) – states explicitly that the Board’s authority to impose conditions – or even to approve an abandonment application – is “[s]ubject to . . . section[] 10904.” In other words, if a financially responsible person purchases a line proposed for abandonment under the OFA provisions set forth in Section 10904, the Board may not approve abandonment of the line under Section 10903 (much less impose conditions on such approval). Consistent with this statutory limitation on the Board’s abandonment authority, the Board’s regulations require that, once a carrier and OFA purchaser enter into an agreement for purchase of the line, “the Board will approve the [OFA] transaction and dismiss the application for abandonment or discontinuance.” 49 C.F.R. § 1152.27(f)(2) (emphasis added).

Fundamentally, the Board’s Section 10903(e) conditioning authority applies only in connection with the Board’s review and approval of abandonment applications. That authority may not be invoked to attach conditions on an OFA purchase transaction under Section 10904. The very premise of an OFA (and the result of every consummated OFA transaction) is that the subject line is not abandoned. That is why Section 10903(e), by its terms, makes clear that the Board’s power to approve an abandonment, and to impose conditions in connection with such approval, are “subject to” the provisions of Section 10904.

Moreover, as a legal matter, any condition that the Board might impose in a decision approving an abandonment application pursuant to Section 10903 becomes a nullity if the line is sold under the OFA procedures. A Board determination that a financially responsible person has offered assistance pursuant to Section 10904 tolls the effectiveness of any prior decision approving the underlying abandonment. 49 C.F.R. § 1152.27(e)(1). If the OFA purchaser subsequently reaches an agreement to buy the subject line, the Board issues an order dismissing the abandonment proceeding. 49 C.F.R. § 1152.27(f)(2). As a result, the abandonment authority is never exercised by the applicant, and any conditions set forth in the decision authorizing the abandonment never become effective.⁵ Indeed, because the State filed its OFA in this case even before the Board issued a decision addressing the merits of MM&A's proposed abandonment, unless the OFA is withdrawn the Board will have no basis to issue a decision approving the abandonment (with conditions or otherwise). Accordingly, there will be no occasion for the Board to approve MM&A's proposed abandonment pursuant to Section 10903(e), much less impose a condition upon that approval requiring MM&A to grant ancillary trackage rights to the State.

⁵ Grants of abandonment authority are permissive, not mandatory. See, e.g., *Consolidated Rail Corp.—Abandonment Exemption—in Hudson Cty., NJ*, STB Docket No. AB-167 (Sub-No. 1189X) (Mar. 23, 2009) (“Abandonment authority is permissive; the railroad can elect not to exercise the authority it has been granted.”); *Consummation of Rail Line Abandonments That Are Subject to Historic Preservation and Other Environmental Conditions*, STB Ex Parte 678 (Apr. 23, 2008) (“The abandonment authority issued by the Board is permissive authority that the railroad may or may not decide to exercise.”). See also *Arkansas Cent. Ry. Co.—Operation Exemption—Line of Herzog Stone Products, Inc.*, ICC Fin. Docket No. 31405 (Apr. 7, 1995) (“Our authorizations for new operations, trackage rights, and abandonments are permissive in nature. Parties obtaining such authority from the Commission are not required to institute operations, enter into trackage rights agreements or to abandon lines. Consummation of any of these actions is at the discretion of the parties”). If the Board approves an abandonment subject to a condition that the applicant carrier finds unacceptable, the applicant may elect not to abandon the line. If the applicant does not exercise the abandonment authority granted by the Board, it is not bound to comply with any conditions that may have been imposed on that authorization.

In any event, the Board has held that its Section 10903(e) conditioning authority does not extend to granting trackage rights in connection with abandonment/OFA proceedings. As the Board recently explained in the context of another OFA:

As explained in *L&N—Paducah*, the agency has no general power to require a carrier to grant another carrier the right to use its lines. Rather, our authority to compel trackage rights arises out of specific provisions of the Interstate Commerce Act namely 49 U.S.C. 11102, when a compelling case has been made for forced terminal trackage rights; 49 U.S.C. 10907(d), when facilities are needed for reasonable interchange in connection with a forced sale under the feeder line development provisions; or 49 U.S.C. 11324, when appropriate as a condition to Board approval of a railroad consolidation.

Delaware & Hudson Ry. Co.—Discontinuance of Trackage Rights Exemption—In Susquehanna County, PA & Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie, & Genesee Counties, NY, STB Docket No. AB-156 (Sub-No. 25X) (Mar. 30, 2005), slip op. at 3 (citing *Louisville & Nashville R.R.—Abandonment Between Paducah & Murray, KY*, ICC Docket No. AB-2 (Sub-No. 31F) (Jan. 26, 1982), slip op. at 8).⁶

Finally, contrary to Huber's assertion (Huber Comments at 3-5) Section 10903(d)'s mandate that the Board consider rural and community impacts when reviewing a proposed abandonment does not provide a source of authority for the Board to grant the State's trackage rights request in this case. Indeed, Section 10903(d) does not confer any conditioning authority.

⁶ A holding that the Board may require an incumbent railroad to grant an OFA purchaser trackage rights over lines that are not included in the proposed abandonment would also be completely at odds with the Board's holding that OFAs may not be used even to acquire trackage rights that are the subject of a discontinuance proceeding. See *Delaware & Hudson Ry. Co.—Discontinuance of Trackage Rights Exemption—in Susquehanna Cty., PA*, STB Docket No. AB-156 (Sub-No. 25X) (rejecting attempt by putative purchaser "to use the OFA process to substitute its own trackage right operations" for those being abandoned and holding that "a party may not use the OFA process to acquire trackage rights over a third party's line in this situation").

Rather, Section 10903(d) simply identifies one factor that the Board must consider in its overall review of an abandonment application. Thus, Section 10903(d) does not expand the scope of the Board's conditioning authority under Section 10903(e)(1)(B), nor does it nullify the clear statement in Section 10903(e) that the Board's authority thereunder is "subject to" Section 10904.

CONCLUSION

For the foregoing reasons, and those set forth in the CP Comments, CP submits that the Board lacks jurisdiction to impose the trackage rights condition requested by the State in this proceeding.

Respectfully submitted,



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Dated: August 10, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Reply Comments of Canadian Pacific Railway Company to be served by first class mail, postage prepaid, this 10th day of August 2010 to all parties of record.



Noah A. Clements